Supreme Court, U. S.
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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

NO. 79-1955

GARY LEE HAYS ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS SUPREME COURT

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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1979

NO. ————

GARY LEE HAYS ..... *Petitioner*

v.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI
TO THE ARKANSAS SUPREME COURT

The Petitioner, Gary Lee Hays, petitions this Court for a Writ of Certiorari to review the final order of the Supreme Court of Arkansas entered April 14, 1980, as amended on May 12, 1980, denying a petition to review the opinion and decision of the Arkansas Court of Appeals entered February 27, 1980, supplemented on April 9, 1980, affirming the Sebastian County Circuit Court judgment of conviction for the offense of Possession of Marijuana with Intent to Deliver entered on April 20, 1979, and submits this petition and argument to show that the United States Supreme Court should accept this case because a substantial federal question is involved.

QUESTION PRESENTED

1. Was the Petitioner's right to confrontation under the United States Constitution violated when the Trial Court permitted the introduction in evidence of taped telephone conversation between a police informant and a codefendant concerning drug transactions to which he was not a party and were hearsay to him?

OPINIONS BELOW

The opinion of the Arkansas Court of Appeals is reported in 267 Ark. App. 712 (Advance Sheets). The Supplemental Opinion of April 9, 1980, is not yet reported. It is set forth in Appendix "B" to the Petition. The Per Curiam Order of the Arkansas Supreme Court of April 14, 1980, is not reported and is set forth in Appendix "D" to the petition.

JURISDICTION

The final order and opinion of the Supreme Court of Arkansas was entered April 14, 1980, as amended May 12, 1980, denying a petition to review the opinion and decision of the Arkansas Court of Appeals entered February 27, 1980, and supplemental opinion and decision entered April 9, 1980, affirming the judgment of the Sebastian County Circuit Court entered April 2, 1979, sentencing Petitioner to three (3) years in the Department of Corrections and assessing a fine of $3,000.00 on the offense of Possession of Marijuana With Intent to Deliver. Notice of filing for Writ of Certiorari to review was filed in the Arkansas Supreme Court on April 14, 1980. A motion to stay the mandate of the Arkansas Court of Appeals and the Arkansas Supreme Court and to remain on bond was filed in the same courts on April 14, 1980. On April 30, 1980, the Arkansas Court of Appeals entered an order granting Petitioner's motion to stay the mandate and to remain on bond for a period of 90 days.

The jurisdiction of the United States Supreme Court to review this decision by Petition for Writ of Certiorari is conferred by 28 U.S.C.A. §1257.

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitutional Provisions involved are Amendments 6 and 14 and can be found in U.S.C.A. Constitution, Amendments 6 and 14, Page 223.

Amendment 6 provides as follows:

— In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment 14, §1 provides as follows:

— All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

STATEMENT

On May 23, 1978, Petitioner along with James Pegues, Teresa Rodriguez and Elizabeth Foster, was charged with the offense of Possession of Marijuana With Intent to Deliver in violation of Act 590 of 1971, (*Ark. Stat. Ann.* §82-2617) alleged to have occurred on April 6, 1978.

On March 15, 1979, Petitioner filed a motion for severance of his trial from the other defendants (R. 15-16), a companion motion in limine to exclude evidence (R. 29-32), supporting briefs for each motion (R. 17-23, 33-38).

The motion for severance alleged that there were taped telephone conversations between a police informant (co-operating individual), Joe Fiori, and a codefendant, James Pegues, about drug transactions and that Petitioner was not a party to the telephone conversations, not present when they were made and that testimony or evidence relating to them would severely prejudice his rights. The basis of the motion was that the statements violated the confrontation clause of the Sixth Amendment to the Federal Constitution.

The companion motion in limine requested that the trial court, prior to trial, exclude the evidence of these taped telephone conversations at trial because it was hear-say as to Petitioner and violated his right to confrontation.

The supporting briefs filed by Petitioner to each motion made it clear to the trial court that he was complaining about the introduction of hearsay evidence and that his right to confront the witnesses against him was being violated. He cited *Kerr v. State*, 256 Ark. 738, 512 SW2d 13 (1974) and the cases cited therein as his authority that his State and Federal right to confrontation was being violated.

On April 4, 1979, a hearing was held on the two motions plus others. Testimony was presented, exhibits were introduced and arguments were made. At the hearing, Petitioner renewed his objection to the telephone tapes either at a joint trial or a separate trial because they were hearsay and violated the confrontation clause of the constitution, were irrelevant and had no probative value. (R. 118-119)

At the close of the hearing on the motions, the trial court overruled Petitioner's motion for severance and companion motion in limine and permitted the introduction of the taped telephone conversations between a codefendant, James Pegues and the police informant, Joe Fiori in evidence at the trial. (R. 158-159)

Petitioner's separate jury trial was held on April 19-20, 1979, the other defendants having entered plea negotiations with the Prosecuting Attorney's Office and they were to plead guilty and be sentenced at a later date. During the trial, the taped communications were played while the jurors each read a transcribed copy thereof. (R. 226, 230) Petitioner renewed his objection (R. 225) to the tapes but no ruling was made to it. At the close of the trial, Petitioner renewed all his motions and the trial court again overruled them. (R. 344)

The conversations took place on March 30, and April 5, 1978, and were a discussion of a proposed purchase of five pounds of marijuana for a price of $675.00. Petitioner was not named or identified in the tapes but there was a suggestion in both conversations that another individual was involved. In addition to the referenced conversation alluded to by the Court of Appeals, the other tape revealed that the codefendant Pegues would have to get the marijuana else-

where (April 5 conversation). In other words, the conversations were part of the prearrangements for the purchase of marijuana on April 6, 1978, which was the date of the alleged offense for which Petitioner was being tried.

In view of this, Petitioner admitted his guilt and pleaded for the jury to recommend a suspended sentence. However, the jury returned a verdict finding Petitioner guilty and fixed his punishment at three (3) years in the Department of Corrections and assessed a fine of $3,000.00. On April 20, 1979, judgment was entered in accordance with the verdict of the jury.

Petitioner appealed the judgment to the Arkansas Supreme Court. Point II of Petitioner's brief alleged that the trial court erred in overruling the companion motion in limine and permitting the introduction in evidence of the taped telephone conversations and cited *Kerr* as authority. The case was referred to the Arkansas Court of Appeals for decision. On February 27, 1980, that court delivered its opinion and decision affirming the judgment of the Sebastian County Circuit Court and disposed of Petitioner's argument in Point IV of its opinion.

On March 13, 1980, Petitioner filed a petition for rehearing in the Court of Appeals and questioned the reasoning of the Court's disposal of this argument. At the same time, Petitioner filed a petition for review of the Court of Appeals' decision in the Arkansas Supreme Court. This petition also questioned the disposal of Petitioner's argument about the telephone tapes in Point IV of the Court of Appeals' opinion.

On April 9, 1980, the Arkansas Court of Appeals denied the rehearing and issued a supplemental opinion concerning

this issue. On April 14, 1980, the Arkansas Supreme Court issued a per curiam order denying the petition for review of the decision of the Court of Appeals. On May 12, 1980, the Arkansas Supreme Court withdrew its per curiam order of April 14, 1980, and entered its final order denying the petition for review.

Petitioner now petitions this Court for a Writ of Certiorari to review the final order and judgment of the Arkansas Supreme Court.

ARGUMENT

Petitioner believes that the question presented is substantial and requires plenary consideration and warrants briefs on the merits and oral argument for resolution of the question. The reason that the question is substantial is set out below.

The opinions and decision of the Arkansas Court of Appeals and the decision of the Arkansas Supreme Court not to review this case has denied the Petitioner his constitutional right to confrontation, due process of law, and a fair trial.

The Sixth Amendment to the United States Constitution provides that an accused has a right to confront the witnesses against him. The Arkansas Constitution (Article 2, Section 10) has the identical provision. This confrontation right in this state trial was violated when the trial and appellate courts of Arkansas permitted these taped telephone conversations to be introduced in evidence in Petitioner's trial and to be considered by the jury in finding his guilt and setting his punishment.

The use of such testimony and evidence brings into play two constitutional rights of a defendant. *Holloway v. State,* 268 Ark. 24, 594 SW2d 2 (1980). The confrontation clause of the Sixth Amendment to the United States Constitution gives the defendant the right to face the witnesses against him. *Barber v. Page,* 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed. 2d 255 (1968). The due process clause of the Fourteenth Amendment to the United States Constitution requires that a defendant be given a fair trial. Compare *Dutton v. Evans,* 400 U.S. 74, 91 S.Ct. 210, 27 L.Ed. 2d 213 (1970), and McCormick, Evidence 2d ed. (1972), §§252-253.

The Petitioner alleged in State Court and alleges in this Court that the introduction of these telephone conversations violated the rule announced in *Bruton v. United States,* 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed. 2d 476 (1968). There, this Court held that the admission in evidence of a non-testifying codefendant's out-of-court statement violated a defendant's right of confrontation. See, also, *Mosby v. State,* 246 Ark. 963, 440 SW2d 230 (1969); *Grooms v. State,* 251 Ark. 374, 472 SW2d 724 (1971).

The case of *Roberts v. Russell,* 392 U.S. 293, 88 S.Ct. 1921, 20 L.Ed. 2d 1100 (1968) reflects that *Bruton* is applicable to the States. The Court held that although *Bruton* involved a Federal prosecution, and that this case was a State prosecution, the right of cross-examination secured by the confrontation clause of the Sixth Amendment is made applicable to the States by the Fourteenth Amendment, citing *Pointer v. Texas,* 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed. 2d 923 (1965) and *Douglas v. Alabama,* 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed. 2d 934 (1965).

The *Bruton* rule applies to situations other than out-of-court confessions by a codefendant. The admission of a non-testifying codefendant's earlier testimony before a grand jury violated the defendant's right to confrontation, as recognized in *Bruton, supra.* See, *United States v. Marks,* 585 F.2d 164 (6th Cir. 1978). The Court also held that its admission into evidence was not harmless either as there was a reasonable possibility that it would have persuaded an otherwise uncertain jury to convict.

The *Bruton* rule applies to out-of-court taped conversations between a codefendant and a police informant out of the presence of the defendant. *Kerr v. State,* 256 Ark. 738,

512 SW2d 13 (1974), *Cert. denied,* 419 U.S. 1110, 95 S.Ct. 783, 42 L.Ed. 2d 806 (1975). However, the Arkansas courts failed to follow the *Kerr* case and permitted the Petitioner's right to confrontation to be violated in this identical situation. And, it is clear that the evidence was prejudicial and not harmless and the case should have been reversed. *Sims v. State,* 252 Ark. 147, 477 SW2d 825 (1972).

A strikingly similar confrontation problem was decided in an opposite way and in favor of the defendant in *United States v. Belle,* 593 F.2d 487 (3rd Cir. 1979). In this case it was held that the admission of a non-testifying codefendant's out-of-court statement violated a narcotics defendant's rights under *Bruton,* even though the statement did not refer to him. The statement did, however, "significantly incriminate" the defendant: the codefendant admitted both his own intention to deliver heroin on the evening he and the defendant were arrested and also his previous transactions with their other companion. The Court held that the *Bruton* rule applies with equal force, "to all statements, that tend to incriminate a codefendant, whether or not he is actually named in the statement." The present case reflects that there was talk of a drug transaction on two occasions which implied that another person, the defendant, was involved, and the codefendant and the defendant were arrested the day after the second conversation.

There is always a discussion in these cases of whether or not the constitutional error is harmless beyond a reasonable doubt in accordance with the rule announced in *Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967). The Courts in the *Marks and Belle* cases held that the error in admitting the evidence was not harmless

beyond a reasonable doubt. In *Marks,* the Court said that it must determine what seems to have been the probable impact on the minds of the average jury, holding that there was a reasonable possibility that the improperly admitted evidence contributed to the conviction and therefore the case was reversed.

In the present case, the evidence probably, although it could have, did not contribute to the finding of guilty. However, in Arkansas, the jury fixes the punishment and not the judge. *Ark. Stat. Ann.* §43-2145. In this case, the Petitioner admitted his guilt and pled with the jury to recommend a suspended sentence which it can do. *Pendleton v. State,* 211 Ark. 1054, 204 SW2d 559 (1947) and *Filtingberger v. State,* 216 Ark. 754, 227 SW2d 443 (1950). However, these out-of-court statements by a codefendant implicated the defendant in other drug transactions and probably had an impact on the jury in its refusal to recommend a suspended sentence. Thus, the error was not harmless beyond a reasonable doubt as it contributed to the punishment part of the verdict.

It appears that the decision of the Arkansas Courts on the issue of confrontation is in conflict with a decision of a federal court of appeals. (Third Circuit Court of Appeals in the *Belle* case and/or Sixth Circuit in the *Marks* case.) Therefore, there is a special and important reason for granting the Writ along with the other reasons discussed in this argument.

CONCLUSION

Petitioner submits that for the above reasons the Petition for Writ of Certiorari should be granted and the case accepted for decision.

Respectfully submitted,

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APPENDIX "A"

ARKANSAS COURT OF APPEALS

GARY LEE HAYS v. STATE OF ARKANSAS

NO. CA CR 79-136

Opinion delivered and filed on February 27, 1980
Appeal from Sebastian County Circuit Court,
Fort Smith District

DAVID O. PARTAIN, *Judge; affirmed*

M. STEELE HAYS, Judge — Appellant was charged and convicted of possession of five pounds of marijuana with intent to deliver in violation of Act 590 of 1971, "The Controlled Substances Act." The jury imposed a fine of $3000.00 and a sentence of three years in the Department of Corrections. Appellant brings this appeal charging that numerous errors in the proceedings below demand reversal.

I

Appellant argues that the trial court erred in permitting the prosecuting attorney to mention in closing argument the detrimental effects of marijuana upon high school students, no evidence having been introduced in this regard. We find the argument to be unconvincing for more reasons than one. The comments are essentially the mere expression of an opinion and were not offered as statement of fact outside the record. We believe the jury would be discerning enough to recognize the difference, particularly in the light of the court's instruction that the opening statements and closing arguments were not evidence and should not be regarded as such by the jury. Words of a similar import

were argued to the jury in closing argument in *Hall v. State*, 264 Ark. 885, and approved by a majority:

> In the final argument to the jury, the Prosecuting Attorney made reference to the deterioration of the community due to its young people injecting heroin into their bodies. Appellant pointed out that there was no evidence in the record to support such argument and moved for a mistrial. The trial court overruled the objection and appellant raises the same issue here. We find no merit to the contention for there is no error in arguing to the jury matters about which courts will take judicial notice . . .

Justice Fogleman, concurring, took some exception to the use of the term "judicial notice" but agreed that it is not prejudicial for an attorney to make comments which are a matter of common and general knowledge. But, an added problem here is that no objection was raised and in the absence thereof, the point will not be considered on appeal. *Rowland v. State*, 263 Ark. 77.

II

Similarly, appellant argues that the trial court erred in permitting the Prosecuting Attorney to argue in closing that a codefendant not on trial would spend three years in the penitentiary. Appellant relies on *Jackson v. State*, 215 Ark. 420, and *Hammond v. State*, 173 Ark. 674, as holding such comment to be reversible error. But again, no objection was offered and the point cannot be raised for the first time on appeal. Nor do the *Jackson* and *Hammond* cases deal with comment in closing argument, as stated. Rather, the error in these cases was in receiving evidence of the conviction of a codefendant.

Clearly, this information, properly objected to, is not admissible evidence and, it follows, not suitable for closing argument. But in the case before us not only was no objection voiced but to some extent the comment was invited by the defense. After having introduced evidence showing that the three codefendants, Pegues, Rodriguez and Foster were also charged with the same crime as appellant, counsel asked the jury to consider why they had waited around the courthouse all day to testify against the appellant, creating, we think, a veiled inference that justified some comment by the prosecution. If appellant felt that comment went too far, it was incumbent upon him to object. The point is that where no objection arises, the court is deprived of an opportunity to correct such inferences, and a party cannot wait for review to raise the issue.

III

Appellant next contends that it was error to permit a police officer, Mr. Yates, to "volunteer" information from the police intelligence files concerning appellant and to permit the Prosecuting Attorney to discuss the matter in closing argument. We disagree with appellant's contention that this witness' answer to a question was not responsive or was the result of "the most careful deliberation." On the contrary, the answer complained of was directly responsive to the question framed to the witness:

BY MR. JOHNSON (T. p. 254):

Q. At that time you had no knowledge of Gary Hays, and your police informant had given you no name or address or telephone number of Gary Hays, is that true?

A. We had information about Gary Hays.

The question was a compound question, and the witness chose to answer the first part dealing with whether he had, as a member of the narcotics squad, information about the appellant. The answer was not unresponsive and doesn't appear to be "carefully deliberate", particularly in view of the answer to a question just preceeding (T. p. 254):

> Q. You never ever had cause to charge him, you had not run across him at all, you haven't run across his name have you?
>
> A. Yes, we have.

It is evident that counsel hoped to elicit from the prosecution's own witness that appellant was unknown to the police engaged in narcotic intelligence, and risked the questions he did; the fact is the answers were responsive, although not those anticipated; and having been received as evidence it was not improper for either side to mention it in argument.

Additionally, as there was no objection at trial, the error appellant now asserts will not be considered.

IV

Appellant filed motions in limine to preclude the introduction of taped conversations between a police informant Joe Fiori, and a codefendant, James Pegues, and urged the exclusion of these conversations at a pretrial hearing. The conversations took place on March 30, and April 5, 1978 and were primarily the discussion of a proposed purchase of five pounds of marijuana for a price of $675.00. Appellant was not named or identified, directly or indirectly, in the conversation — in fact the only words remotely suggesting the involvement of someone else are: (T. p. 230)

FIORI: . . . I'd like to do some business with you, you know.

PEGUES: Well, it's not up to me.

At the hearing on appellant's motions in limine counsel strenuously objected to the introduction of the tapes, but the court ruled that they were admissible as to Pegues, a codefendant, and did not implicate the appellant in any fashion. We think the ruling of the trial court was proper. The conversations were part of the prearrangements for the purchase of marijuana on April 6, which was the sale for which appellant was being tried and we find no error in receiving this evidence. It is perhaps inevitable that some circumstances or conversations preceding prearranged drug purchases are likely to come before the jury and it is the responsibility of the trial court under Rule 404 and 403, Ark. Stat. Ann. §28-1001, to weigh the probative value of the evidence against whatever prejudicial impact it may have. Here there was little of either in the content of the tapes and we think the court was justified in overruling the motions in limine and in receiving the tapes into evidence at trial, particularly in view of counsel stating "no objection" as each tape was offered in evidence.

Counsel argues that the tapes were hearsay, and we agree with him, in that they became objectionable as hearsay evidence *after* the codefendant, Pegues was severed from the case; however, this objection should have been renewed at trial and the record at pages 224 and at 228 make it clear that the tapes were not objected to.

V

Finally, appellant urges that it was error to permit the introduction of evidence of other marijuana sales by the

appellant to show intent, motive and design where appellant intended to take the stand and admit the fact of his possession of marijuana with intent to deliver. We need not reach the heart of this rather ingenious argument, for the reason that we are unable to agree that testimony of other sales *by the appellant* was in fact received in evidence. Officer Yates testified to the purchase of one pound of marijuana by Joe Fiori at the residence of James Pegues and Teresa Rodriguez at 2123 Churchill Street on two separate occasions, one on March 14 and another on March 23. However, there was no evidence, direct or circumstantial, linking the appellant to these sales and therefore, we do not consider the evidence to be analogous "to the other offenses" within the exclusionary rule.

We do not find, viewing this case overall, that there was prejudicial error mandating a reversal. In arriving at that conclusion we are swayed by the fact that the appellant not only admitted the offense with which he was charged, as well as the requisite intent, but he also admitted being the supplier of marijuana for at least five or six people over what seems an extended period of time. Appellant's admission of guilt of the offense he was charged with largely removes the risk which was cited in *Alford v. State,* 223 Ark. 330, as the reason for the exclusion rule, *i.e.*, the danger of an innocent defendant being convicted. A trial is, or should be, a search for the truth of the guilt or innocence of the accused, and not an exercise in legal theatrics to determine whether all the rules of evidence and procedure (with the many shades of gray) can be kept inviolate. Where guilt is assured from the accused's own testimony in the form of a judicial confession, we think the

scrutiny of appellate review should be relaxed at least where the penalty is within the law.

Appellant hoped, obviously, for a suspended sentence. The fine and sentence of three years does not strike us as unreasonable in the least, all things considered. There can be no assurance that simply because an accused has no previous record he is justified in thinking he was mistreated if not given a suspended sentence. Some are so fortunate but absolute uniformity in such matters has not, as yet been realized.

Finding no prejudicial error, we affirm.

APPENDIX "B"

ARKANSAS COURT OF APPEALS

GARY LEE HAYS v. STATE OF ARKANSAS

NO. CA CR 79-136

Supplemental opinion delivered and filed on April 9, 1980
Appeal from Sebastian County Circuit Court,
Fort Smith District

DAVID O. PARTAIN, *Judge; Rehearing denied*

Per Curiam — In its petition for rehearing, appellant argues that the original opinion clouds the rule that a party need not renew an objection to evidence at trial which has been objected to by a motion in limine. Appellant cites *Bell v. State,* 120 Ark. 530, which does not support the point. However, because appellee agrees, in part, with appellant's argument, although not agreeing that the case should be reheard, the original opinion is clarified by pointing out that the decision did not turn on the issue of whether the objection is preserved throughout the trial by a motion in limine, but rather on the fact that the appellant plainly and unmistakably *waived* whatever earlier objection he had made by stating "no objection" in each instance when the tapes were introduced. When the first tape was offered the following occurred: (T. p. 223)

MR. FILYAW:

Q. I will show you what has been marked as Plaintiff's Exhibit No. 4, which is a typewritten copy of a transcript of a conversation, and ask you to glance over that carefully and tell me if you are familiar with that?

A. Yes, sir, that's the telephone conversation of March 30.

Q. Is that the transcript of the tape that you have there?

A. That's correct.

Q. Well, is this correct with the conversation?

A. That's correct.

Q. That is a correct and accurate transcript?

A. Yes, sir, it is.

MR. JOHNSON: No objection.

When the second tape was offered: (T. p. 227)

MR. FILYAW:

Q. And I will show you Plaintiff's Exhibit No. 5, another transcript. Would you please read through that. Is that an accurate transcription of the conversation that day?

A. That's correct.

Q. You did tape that?

A. Yes, I did.

Q. And you have the tape with you today?

A. Yes, sir, I do.

MR. JOHNSON: No objection.

Appellant cannot affirmatively remove his objection when evidence is offered at trial and seriously contend on appeal that reversible error has occurred.

Petition denied.

APPENDIX "C"

IN THE ARKANSAS COURT OF APPEALS

LAW OR CHANCERY MANDATE

GARY LEE HAYS v. STATE OF ARKANSAS

NO. CA CR 79-136

ORDER DENYING REHEARING

BE IT REMEMBERED, That at a session of the Court of Appeals of the State of Arkansas, begun and held in the City of Little Rock, on the 9th day of April, 1980, amongst others were the following proceedings in the above styled case, to-wit:

Petition for Rehearing is denied.

/s/ Jimmy H. Hawkins, Clerk

Filed in the Arkansas Court of Appeals on April 9, 1980.

APPENDIX "D"

SUPREME COURT OF ARKANSAS

GARY LEE HAYS v. STATE OF ARKANSAS

NO. CR 80-80

Opinion delivered April 14, 1980
Petition for Review: Denied.

Per Curiam: The petition for review in this case is denied. However, we feel that one question raised should be discussed. The petitioner Hays alleges that the Court of Appeals in its opinion incorrectly stated the law regarding whether an objection once properly made before trial has to be renewed during the trial. Our decisions are to the effect once a proper objection is made, it is not necessary to renew it. *Bell v. State,* 120 Ark. 530, 180 SW 186 (1915). The Court of Appeals' opinion does contain an incorrect statement of the law in this regard.

However, we do not automatically grant a review of a decision by the Court of Appeals because it contains an erroneous statement of the law. The Court of Appeals' opinions are not binding precedents and simply because a mistake has been made by the Court of Appeals, we do not necessarily grant review. See, *Moose v. Gregory,* 267 Ark. —— (Opinion delivered November 13, 1979).

Aside from the erroneous statement of the law, we find no reasons, according to Rule 29 of the Rules of this Court, to grant review in this case and, therefore, deny the petition.

APPENDIX "E"

IN THE SUPREME COURT OF ARKANSAS

GARY LEE HAYS v. STATE OF ARKANSAS

NO. CR 80-80

(Court of Appeals No. CA CR 79-136)

ORDER DENYING REVIEW

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the First day, being the first Monday of October, A.D. 1979, amongst others were the following proceedings, to-wit:

On the 14th day of April, A.D. 1980, a day of said term came on to be heard the above styled case and the following order entered:

Petition for Review is denied.

/s/ Jimmy H. Hawkins, Clerk

Filed in the Arkansas Supreme Court on April 14, 1980.

APPENDIX "F"

IN THE SUPREME COURT OF ARKANSAS

GARY LEE HAYS v. STATE OF ARKANSAS

NO. 80-80

SUBSTITUTED ORDER DENYING REVIEW

BE IT REMEMBERED, That at a term of the Supreme Court of the State of Arkansas, begun and held at the Court Room in the City of Little Rock, on the First day, being the first Monday of October, A.D. 1979, amongst others were the following proceedings, to-wit:

On the 12th day of May, A.D. 1980, a day of said term came on to be heard the above styled case and the following order entered:

Per Curiam Order of April 14, 1980, is withdrawn and the Petition for Review is denied.

/s/ Jimmy H. Hawkins, Clerk

Filed in the Arkansas Supreme Court on May 12, 1980.

APPENDIX "G"

IN THE SUPREME COURT OF ARKANSAS
AND
ARKANSAS COURT OF APPEALS

GARY LEE HAYS v. STATE OF ARKANSAS

NO. CR 80-80, and
NO. CA CR 79-136

NOTICE OF FILING FOR
WRIT OF CERTIORARI TO REVIEW

Comes the Appellant-Petitioner, Gary Lee Hays, and hereby gives notice of filing for Writ of Certiorari to review the final decision of the Arkansas Supreme Court entered on April 14, 1980, as amended on May 12, 1980, denying certiorari to review an opinion and decision delivered on February 27, 1980, and amended on April 9, 1980, by the Arkansas Court of Appeals affirming the Judgment of the Sebastian County Circuit Court, dated April 20, 1979, and designates the entire final Judgment, Opinion and Decision of the Arkansas Supreme Court and Arkansas Court of Appeals to be reviewed by Certiorari.

The review by Certiorari is taken to the United States Supreme Court under the provision of 28 U.S.C.S. §1257(3).

/s/ Robert S. Blatt

Filed in the Arkansas Supreme Court on April 14, 1980.